

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING**

76-4232

United States Court of Appeals

For the Second Circuit

WILLIAM M. IVLER and BARBARA IVLER,
Plaintiffs-Appellants,
against
COMMISSIONER OF INTERNAL REVENUE,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES TAX COURT

PETITION OF APPELLANTS FOR REHEARING

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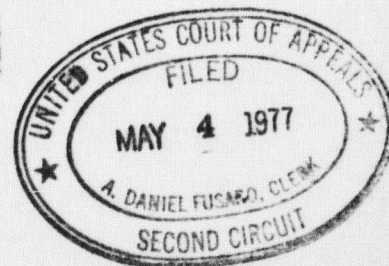


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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-4232

WILLIAM M. IVLER and BARBARA IVLER,
Appellants,
v.
COMMISSIONER OF INTERNAL REVENUE,
Appellee.

ON APPEAL FROM THE UNITED
STATES TAX COURT

PETITION OF APPELLANTS FOR REHEARING

PRELIMINARY STATEMENT

Appellants hereby respectfully petition this Court for rehearing of the above-captioned appeal. In rejecting appellants' position that payments received by appellant William M. Ivler ("Ivler") from the Gevyn Construction Corp. ("Gevyn") should be given capital gains treatment, this Court held that the terms of a document which described such payments as "bonus" and "salary" were determinative because of a lack of "strong proof" that the monies involved were

actually paid for release of Ivler's right to acquire a stock interest in Gevyn. This Court stated:

"There is not present here the necessary 'strong proof' that the contract dated November 30, 1965 did not reflect the substance of the agreement between appellant William M. Ivler and Gevyn Construction Corp. We agree with the opinion of Judge Fay, filed July 19, 1976, that 'The record compiled herein hardly elucidates the terms of the agreement pursuant to which' appellant allegedly 'acquired' rights to 'an equity interest in Gevyn.' " Order and Judgment dated April 20, 1977."

As shown below, the record does present the necessary "strong proof" that the November 30, 1965 document did not reflect the realities of the transaction involved and that the payments to Ivler in 1966 and 1967 were actually payments to Ivler for release of a capital asset. It is respectfully submitted that this Court's holding may have been influenced by testimony that Ivler's right to acquire stock was contingent on the development of a mutually satisfactory relationship between Ivler and the principals in Gevyn (George and Evelyn Ungar) between 1963 and 1965. However, as shown below, the evidence is uncontradicted that under the 1963 oral agreement the Ungars' ability to prevent Ivler from acquiring Gevyn stock consisted only of an agreement that

the Ungars or Gevyn could buy Ivler's right to obtain stock by paying Ivler certain amounts to be determined by valuing the net worth of the portion of Gevyn which Ivler would otherwise be entitled to acquire. The payments to Ivler in 1966 and 1967 reflected this very aspect of the 1963 agreement, and constituted payments to Ivler for release of his right to obtain Gevyn stock. For the reasons given below, appellants request that this Court reconsider its decision.

POINT I.

UNCONTRADICTED EVIDENCE CONSTITUTES
"STRONG PROOF" THAT IN 1963 IVLER
RECEIVED A RIGHT TO ACQUIRE GEVYN
STOCK AT SPECIFIED TIMES AND FOR
A SPECIFIED CONSIDERATION.

Ivler testified that in 1973 he met with the the Ungars and discussed leaving his law practice to participate with them in Gevyn. Ivler stated that:

"the deal that we had discussed and agreed upon out there was that the \$270,000.00 [existing net worth in Gevyn] was theirs, that I was gonna have one third of the business...."
App. 32-a to 33-a.

The testimony continued as follows:

"THE COURT: We have just finished saying that the two hundred and seventy was there, and you said alright, fine, I can understand why you don't want to give me a part of that, but give me stock interest --

THE WITNESS: Right

THE COURT: --and that's where we were.

THE WITNESS: The stock interest was going to be as if their two seventy was taken off the top, so I was to have one third of the stock of Gevyn, George was to retain fifty one percent which is an absolute condition, always that he would have control of the situation, Evelyn would have the difference. We discussed at length the fact of drawing as little money as possible out of the deal because it was necessary the more bonding capacity we could have, the bigger jobs we could do, the bigger jobs we could bid, and get, the more profits we could make; and a bonding company required as all bonding companies did, they based the bonding capacity on net quick assets. So, the more money and cash we could leave in the business, the more bonding capacity we could get. And that was the understanding that we made out there in Vegas. App.34-a to 35-a.
(emphasis added)

Ivler also testified and the Tax Court found that he agreed with the Ungars that he would receive an annual salary of \$30,000. App.15-a; 35-a-36-a.

Ivler stated that his agreement with the Ungars was subsequently revised to provide that the Ungars would have the right to buy Ivler out of his one-third stock interest for one half of the value of such stock interest during the first two years of Ivler's employment by Gevyn, and would have the right to buy Ivler out of his one third

interest by paying Ivler the value of the full one-third interest at any time during the third through the fifth year of Ivler's employment. Subsequent to the fifth year, the Ungars would not be entitled to buy Ivler's right to obtain Gevyn shares. App.37-a to 38-a.

The only other witness was Evelyn Ungar, who also testified that in 1963 Ivler received a right to purchase a stock interest in Gevyn, which right would become enforceable as to one-sixth of Gevyn stock after two years and as to his remaining one sixth after five years. Describing the conversation in July 1963 in Las Vegas, Evelyn Unger stated:

"And as a result we said, well, lets work together for two years and see whether or not it's a successful association and we're happy with one another and if so, then he - - then you can purchase one-sixth of the corporation, and then we'll continue working together for another three years and if it remains a successful association and we are happy with one another, you can ultimately buy up to one-third of the corporation.

* * *

Q And, you testified that --that one-sixth was to be purchased in two years contingent upon the association working out?

A Yes." App.83-a to 84-a.

In further testimony, Evelyn Unger stated:

Q And you recognize, did you not, that Mr. Ivler had an interest in that business?

A I recognized that Mr. Ivler had a right at the end of two years to buy an interest in the business.

Q He had a right, is that correct?

A At the end of two years, if we were mutually agreeable to do so, he could buy one-sixth of the business. Yes, I think this memo discusses that. And the date is clear. June 30, '65 is two years after Mr. Ivler joined us." App.103-a.

It is important to note that Evelyn Ungar's testimony did not contradict Ivler's testimony that in 1963 the Ungars had agreed that they or Gevyn would buy Ivler's right to obtain stock in Gevyn if they did not wish to allow him to become part owner of Gevyn.

Evelyn Ungar also testified that:

"and of course, the salary was to remain low so that he could have enough money to purchase one-sixth of the stock at the end of the two years." App.85-a.

When the Court inquired how Ivler was to purchase the stock if his salary was kept low, Evelyn Ungar testified that Ivler would acquire the funds from the difference between the amount he obtained as salary and the value of his percentage interest in the corporation. App.86-a. While Evelyn Ungar in her testimony characterized such difference between salary and his participation in the net worth of the business as "bonus", her testimony does not challenge Ivler's testimony that in 1963 Ivler obtained

the right to acquire a stock interest in Gevyn (subject to the agreement that the Ungars or Gevyn could buy out such right) and that the manner and price of such acquisition would consist of treating one-sixth (after two years) and one-third (subsequently) of the net worth of the company (after deduction of \$270,000) as Ivler's purchase price for his stock interest. App.86-a.

Documentary evidence also strongly supports the conclusion that Ivler obtained a right to purchase Gevyn securities when he agreed to leave his law practice and become employed by Gevyn. Exhibit 7-G, a memorandum written to Ivler by Evelyn Ungar prior to execution of the document dated November 30, 1965 (App.41-a to 43-a; 97-a to 98-a; 102-a), is permeated by Evelyn Ungar's understanding that Ivler was already entitled to acquire a stock interest in Gevyn. For example, Exhibit 7-G states on page 2:

"Therefore, I reminded him that our wills left you 1/3 right now and that on the re-draw of the wills, we would again leave you 1/6 (1/6 being yours after this agreement is executed). The tax consequences to you from an inheritance of the stock, are according to Jack far less than the purchase. Thus, it is up to you whether you want to live with us another 3 years on our word that you are getting another 1/6 at the end of the 5th year and on our further word, that our wills, once drawn, will not be altered during the intervening years."

Exhibit 7-G further states on page 2:

"If we establish, for arguments sake, that your share, with drawings already off, for 6/30/65 is actually (not book or capital-wise) worth \$60,000 (house number), then the intention was that this is considered your money and the actual value of your stock."

That all parties understood that an agreement existed under which Ivler was entitled to acquire a one-third interest in Gevyn out of his share of Gevyn's net worth, one-half of his stock interest to be received as of June 30, 1965 and the balance as of June 30, 1968, is also reflected on pages 1 and 2 of Exhibit 9-I. That Exhibit is a memorandum dated September 10, 1965 by the Ungar's attorney (e.g., App.47-a; 66-a to 69-a). While that memorandum discusses possible tax ramifications of employing different mechanics to implement the 1963 agreement, the memorandum recognizes that the various alternatives discussed are all designed to effect "essentially the same business arrangement" which had been reached by the parties in 1963. Exhibit 9-I, p.2.

Consequently, appellants submit that strong proof supports the finding of the Tax Court that:

"It was agreed that William's salary be fixed at \$30,000 annually and that he acquire one-third of the stock of Gevyn outstanding." App.15-a.

Such finding and the record, however, are inconsistent with the Tax Court's other finding that:

"The record compiled herein hardly elucidates the terms of the agreement pursuant to which William acquired those rights... [i.e., the rights he subsequently released]." App.17-a.

While in 1965 and 1966, questions were raised concerning the precise mechanics and tax effect of effectuating the original agreement, the record demonstrates that in 1963, Ivler obtained a right to acquire a one-third equity interest in Gevyn according to a set timetable and at an agreed consideration, subject only to the Ungars' right to buy Ivler's interest (again at an agreed consideration) if they were not happy with him. Thus in 1963, the parties had agreed upon all the basic terms of a contract under which Ivler became entitled to purchase Gevyn stock.

The courts have recognized that

"A contract will be given that construction which will make it valid and binding instead of a construction which would make it void or unenforceable." American Sugar Refining Co. v. Newman Grocery Co., 284 Fed.835, 836 (5th Cir. 1922).

See generally, 1 Corbin, Contracts §95 (1963). Professor Corbin has described the appropriate legal principle as follows:

"If the parties have concluded a transaction in which it appears that they intend to make a contract, the court should not frustrate their intention if it is possible to reach a fair and just result, even though this requires a choice among conflicting meanings and the filling of some gaps that the parties have left." Id. at 400.

In the present instance, the oral agreement was complete as to all basic terms, and Ivler and the Ungars acted subsequent to July 1963 as if an agreement had been reached entitling Ivler to acquire an equity interest in Gevyn. The open questions concerning mechanics for implementing the agreement were not so fundamental as to render the agreement unenforceable. See, e.g., Marek v. McHardy, 234 La. 841, 101 So. 2d 689 (La. 1958) (agreement to give plaintiff a 10% interest in partnership after 36 months of employment not unenforceably indefinite from lack of agreement on details such as hours to be worked, vacations, duration of partnership). See also Uniform Commercial Code §2-204 (contract for sale of goods shall not fail for indefiniteness if parties intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy).

Under the foregoing principles, Ivler's 1963 agreement with the Ungars should be regarded as an enforceable contract despite the fact that certain mechanics were left

to be resolved at a future date, and this Court should reject the finding of the Tax Court that the record does not sufficiently elucidate the terms of the 1963 agreement.

POINT II

STRONG PROOF EXISTS THAT THE CONTRACT
DATED "AS OF NOVEMBER 30, 1965" DID
NOT REFLECT THE SUBSTANCE OF THE
AGREEMENT BETWEEN IVLER AND GEVYN.

Exhibit 3_C (executed in February 1966) provides that Ivler was to receive a "salary" of \$100,000 per annum for two years to commence retroactively to November 30, 1965. At that point in time, Exhibit 11, an overhead projection prepared by Evelyn Ungar in July, 1965, was in existence showing that the highest salary paid by Gevyn was \$50,000 paid jointly to the Ungars and that the highest single salary was that of \$30,000 being paid to Ivler. What logic or reason can justify the acceptance of the existence of an agreement to pay \$70,000 additional "salary" for two years when Evelyn Ungar testified App. 86-a; 90-a. that Ivler's performance was unsatisfactory to the Ungars? To state that there was no strong proof to overcome the contents of the writing, is to conclude that there were logical, business reasons for the employer, Gevyn, to agree to pay \$140,000 additional "salary" as well as a "bonus" of \$160,000 for such an unsatisfactory employee. This is not supported, however, by the evidence.

Exhibit 11, together with Ivler's testimony, App.62-a through 65-a and Evelyn Ungar's incredible loss of memory, App.115-a - 116-a, clearly supports the fact that prior to paying Ivler a "bonus" of \$160,000, Gevyn had no bonus policy and had only once paid a bonus of \$2,000 to an employee. The characterization in Exhibit 3-C of "bonus" and "salary" must fall to the strong proof that such could not logically or reasonably have been the true agreement between Ivler and the Ungars.

Evelyn Ungar confirmed that in 1965 Ivler and the Ungars concluded that they could not work together, and as a result, the payments in 1966 and 1967 were made. App. 86-a; 90-a. As Evelyn Ungar so aptly stated at App. 103-a:

I recognized that Mr. Ivler had a right at the end of two years to buy an interest in the business.

The record also shows that the amount eventually paid to Ivler in 1966 and 1967 pursuant to the November 30, 1965 document, was not determined by valuing Ivler's services, but rather by determining the appreciated value of Gevyn. See, e.g., App. 53-a, 54-a. See also Exhibit 9-I pages 14-16; Exhibit 10-1, -2, -3; Exhibit 11.

Consequently, the record strongly supports a finding that the 1966 and 1967 payments were intended to pay Ivler for the release of his right to acquire stock in Gevyn. Since such a right is a capital asset, the payments to Ivler for relinquishing that right constituted payment for the sale or exchange of a capital asset, and should have been taxed at capital gain rates. See, e.g., Commissioner v. Ferrer, 304 F.2d 125, 132 (2d Cir.1962); Dorman v. United States, 296 F.2d 27 (9th Cir.1961).

CONCLUSION

For the reasons given above, this Court should grant appellants' petition for a rehearing and should reverse the July 1, 1976 Order of the Tax Court determining that deficiencies exist in appellants' federal income tax returns for 1966 and 1967.

Respectfully submitted,

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STATE OF NEW YORK)
COUNTY OF NEW YORK)ss.:

TOVE MATAS, being duly sworn, deposes and says:

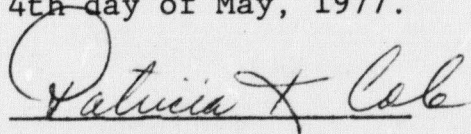
That deponent is not a party to the action; is over the age of 18 years and resides at 3 Schulz Street, Westbury, New York.

That on the 4th day of May, 1977, deponent served the within PETITION OF APPELLANTS FOR REHEARING on the attorneys listed below by depositing 2 copies of same in a post office box regularly maintained by the United States Government, directed to each of them at their respective addresses set forth below:

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Washington, D.C. 20224

Sworn to before me this
4th day of May, 1977.



PATRICIA K. COLE
Notary Public, State of New York
No. 30-5755240
Qualified in Nassau County
Commission Expires March 30, 1978

